No. 397.

Brief of English for P. & E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Feb. 28, 1898.

A. J. SELVESTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
} No. 397.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement.

On October 26, 1894, James Selvester was indicted by the United States grand jury at San Francisco, California, for the northern district of California.

The indictment found by this grand jury contained four counts. The first count charged the accused with having in his possession three pieces of false, forged and counterfeit coins of the resemblance and similitude of the fifty-cent piece of the United States. The second count, with uttering two counterfeit fifty-cent pieces. The third count, with uttering three counterfeit fifty-cent pieces. The fourth count, with making five counterfeit fifty-cent pieces.

The accused pleaded not guilty to each and all of the counts of said indictment, and on May 18, 1896, was placed on trial to answer the same. After hearing the whole case,

the jury retired on May 19, 1896, to pass upon and respond to the issues submitted to it.

On the same day, but subsequently, the jury returned into Court and announced that they were unable to agree, but stated that they agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the Court if they could return such a verdict. The Court informed them they could, and the District Attorney then asked leave of the Court to enter a *nolle prosequi* as to the fourth count, to which motion the counsel for the defendant objected, and upon such objection the District Attorney withdrew his said motion and the jury then, without retiring, drew up and signed the following as their verdict:

"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second and third counts of the indictment, and disagree on the fourth count of the indictment."

The Court, despite defendant's objection and exception, received said verdict and caused the same to be recorded, and the jury was then discharged.

On June 1, 1896, the prisoner being in open court, on motion of the United States District Attorney, was called for sentence. The attorney for the defendant moved the Court, in arrest of judgment, on the ground that the verdict was incomplete. This motion was by the Court denied. The defendant, by his attorney, duly excepted.

The attorney for the defendant then moved to set aside the verdict on the ground that the same was incomplete. This motion was denied, and the defendant duly excepted.

Attorney for the defendant then moved for a new trial. This motion was denied and the defendant duly excepted.

The Court then adjudged that the defendant stood convicted, and sentenced him to pay a fine of one thousand

dollars and be imprisoned for the term of ten years at hard labor, and in default of the payment of said fine of a thousand dollars, that he be further imprisoned until said fine be paid, or until he be otherwise discharged by due process of law.

On July 8, 1896, the defendant filed a petition for a writ of error and the same was allowed and citation issued on the same date.

Assignment of Errors.

1. That the Court erred in denying defendant's motion for arrest of judgment herein.

2. That the Court erred in denying defendant's motion to set aside the verdict rendered herein.

3. That the Court erred in denying defendant's motion for a new trial.

4. That the Court erred in proceeding to sentence upon the verdict rendered herein.

Argument.

In the case under consideration the Government prepared an indictment in which was charged three different crimes in the form of four counts. Two of these counts charged the commission of the same offense under different circumstances. Each count charged Selvester with having committed an act which is made a crime by statute. Each one of these counts, except the two which charged the commission of the same offense, charged Selvester with committing, what by statute, is a distinct and separate crime. For the commission of either crime, though each is a different crime by statute, there is affixed the same penalty, to wit: A fine of not more than five thousand dollars and imprisonment at hard labor for not more than ten years. All these dif-

ferent crimes are defined and described in one and the same section of the Revised Statutes, to wit: Section 5457.

A Criminal Proceeding is Mandatory and Can Not be Deviated From in any Particular.

In a criminal case, the proceeding is one between the State and the accused, and the procedure as laid down is mandatory upon the agents of the State. A failure to comply with every step specified by law, invalidates the entire proceeding. Neither agent of the State nor the accused can legally waive any proceeding which the law requires to be done. The accused has no power to change the law of procedure by waiving any step which the law requires the agents of the State to perform. The law of criminal procedure is as unchangeable as the law of nature, except to the power which created it.

Therefore, in any criminal suit, the slightest deviation by the agents of the State or Government, who are represented in the person of the judge, prosecuting attorney, and officers of the Court, on the one hand, and the grand jury and the petit jury, which is in one sense but one jury, on the other hand, invalidates the entire proceeding, and no power lies in the Court to make good what the law declares to be void.

The distinction between a civil suit and a criminal suit is very marked. A civil suit is a controversy between two persons and being such they can waive a resort to any part of the procedure laid down by the law, or settle their differences without a court of justice if they see fit.

Though there exists this difference between criminal and civil cases, yet when before a Court

The Rules Relating to Civil and Criminal Verdicts Are Alike.

All rulings laid down in civil cases as to what is required in order to make a verdict complete and sufficient upon which to render a judgment, is applicable in criminal

cases, but the rules are usually far more strictly enforced where the life or liberty of a person is at stake, though the law does not command a more strict enforcement.

It was a principle laid down by Chief Justice Holt, 1 Salkeld, 51, that whatever at common law might be amended in civil cases, was at common law amendable in criminal cases. *E Converso*, whatever the law prohibits from being amended in civil cases, cannot be amended in criminal cases.

And further, whatever the law requires in a verdict in a civil cause, it will require in a criminal cause, as the rules are the same. (3 McLean C. C., 233; Greenleaf in Evidence, Section 65.)

ACCUSED ENTITLED TO VERDICT ON EACH CHARGE.

If the Government had prepared a separate indictment for each of the crimes it charges in the different counts under consideration, and the grand jury had returned each of these separate indictments as a true bill, the accused would have been entitled under the Constitution to a trial on each indictment and a verdict of guilty or not guilty from a legal jury. After the grand jury once returned the accusation into Court, the law gave the accused the right to a trial and a verdict of guilty or not guilty, and the agents of the Government could not deprive him of that right.

When the grand jury returned the indictment under consideration with its four separate and different charges or counts, accusing Selvester of having committed three distinct and different crimes, and one of these crimes on two occasions, the Constitution and the law conferred on him the right to the verdict or answer of a legal jury on each and every one of the counts, and until a jury passed upon each of these charges and responded by a verdict of guilty or not guilty on each, it had not performed its duty and had not rendered a legal verdict or decision.

An indictment, whether containing one or more counts, must be considered as an entire thing. It is one indictment made up of different parts, and but one jury can pass upon it at the same time, and but one verdict be rendered in response to it, yet at the same time that verdict must respond to each charge.

If there be a defect in an indictment containing several counts, and it be quashed for that defect, the whole indictment is destroyed. This demonstrates the entirety of an indictment even though it be composed of several counts.

A verdict which does not answer each charge in an indictment is no verdict at all. A jury which fails to fully answer each count in the indictment has not performed its duty, and no judgment can be founded on other than a full performance. Its action, when its verdict is incomplete, is equivalent to none at all and a nullity.

A Jury Must Respond to the Issues.

In the early English and American cases tried by a jury the rule that the answer of the jury to the issues submitted to it should be strictly responsive was very rigidly enforced, and any finding which did not respond to the issues submitted was set aside as void. This rule applied to both civil and criminal cases. (3 Salkeld, page 372; Croke Elizabeth, 133; 12 Mod., 5; 1 Vent., 27; Cro. Jac., 328; 2 Lord Raymond, 520; Cowp., 706; Dougl., 666; 1 Term Report, 239; *Id.*, 447; Graves *vs.* Morley, 3 Levinz's, 55; Rosse's Case, 3 Leon, 83; Kerr *vs.* Hartshorne, 4 Yeates, 295; 1 inst. a 227; Smith *vs.* Raymond, 1 Day, 189; Bacon's Abridgment, verdict (letter M); Broshway *vs.* Kinney, 2 Johns, 210; Van Bethuysen *vs.* De Witt, 4 Johns, 213; Patterson *vs.* U. S., 2 Wheaton, 222; Garland *vs.* Davis, 4 Howard, 132; Downey *vs.* Hicks, 14 Howard, 241.)

It is also laid down as a rule that a *venire de novo* is granted when the finding of the jury is less than the whole matter put in issue. (Cro. Jac., 31; 2 Lord Raymond, 1521, 2; 4 Barn. and Cress., 69; 6 Dowl. and Ryl., 68 S. C.; 1 Chitty Criminal Law, 646.)

After the defendant is once placed upon trial every count in the indictment becomes an issue, which it is the sworn duty of the jury to respond to with a verdict of guilty or not guilty. (American Encyclopedia of Law, Vol. 28, title Verdict, division Responsiveness, page 281, 1st Ed,; same, page 292.)

When a verdict does not include a finding upon every fact in issue it is not a verdict at all, but a nullity. (Ford *vs.* Taggart, 4th Texas, 492; Wood *vs.* McGuire's Children, 17th Ga., 361; 63 American Decisions, 246.)

And the jury must find the issue either for or against the accused. (Holmes *vs.* Wood, 6th Mass., page 1; Settle *vs.* Allison, 52 American Decisions, page 393.)

And answer the whole issue and not a part. (Kerr *vs.* Hartshorne, 4 Yeates, page 295; 1 Lord Raymond, 324.)

According to the judge in Pritchard *vs.* Hennessy (1 Gray (Mass.), 294), it was the practice for more than four hundred years in England to send out the jury when they returned a defective finding.

In Traun *vs.* Wittick, 27 Ala., 570, the Court said:

"It is laid down as an elementary rule, that a verdict is void if it find only a part of the issue. (6 Com. Dig., tit. Pleader, S. 19, and cases there cited.) It must also be certain—that is, must find the fact clear to a common intent. *Id.* 21.")

Continuing the Court said :

"The Court must not be left to infer or guess at the meaning of the jury, and to arrive at a conclusion as to the extent of their finding by argument and doubtful inference; but the facts must be found with such reasonable certainty as will enable the Court to pronounce a satisfactory judgment, definitely settling the rights of the parties."

The strictness of the English rule—that a verdict was void where the jury failed to respond to all of counts or issues—has been departed from in some of the States in criminal cases, but only where the failure to respond was not injurious to the accused. It has been held that where there are several counts in an indictment, and the jury find the defendant guilty on one or more, and make no finding on one or more of the counts, that the presumption is that the jury intended to acquit the defendant on the charge or charges which it does not respond to. These cases, however, are nowise in point in the case under consideration. In the case now before this Court the jury distinctly stated to the Court that it was unable to agree on one of the counts of the indictment. It was clearly the duty of the Court, on the jury making known this fact, to send it out again, and if it could not agree to discharge it.

AN ANSWER TO EACH CHARGE A CONSTITUTIONAL RIGHT.

When issues in the form of charges are once raised against an accused, he is entitled to an answer from the jury upon each of the charges which are made against him. To use the words of the Hon. Justice Harlan, speaking as the organ of this Court, in Hodges *vs.* Easton (106 U. S., page 112):

"It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done, was secured by the Constitution of the United States."

The correctness of this ruling is very clear, for it would be manifestly unfair to one accused of a crime, not to have a jury of his own countrymen determine and forever set at rest the truth or falsity of the charges which were made against him.

The jury which tried Selvester was sworn to try and determine the issues which were submitted to them. On their failure to do this, and their declaration that they could not do it, it was the duty of the judge to discharge them and to afford Selvester a new trial.

In Deady *vs.* U. S. (152 U. S., 539), this Court held that—

"Each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

In the above case the crime was conspiracy to defraud under section 5440, Revised Statutes, and the different counts referred to were but different transgressions of the same law, and not offenses against different laws. While it is true that "each count is in form a distinct charge of a separate offense" it is also true that it is not the whole indictment, and a jury does not respond to the indictment unless it answers each count and returns an agreed verdict upon the whole indictment, either by word or by legal presumption. By legal presumption is meant the case where the counts are not referred to, but which the law presumes are verdicts of not guilty. But the law will not carry this legal presumption to cases either where the jury refuses to make any return at all or makes a return that it disagrees on part of the indictment. In either case there is no verdict.

The law will not presume a jury intended to find not guilty on all the counts because it ignores all. But when it finds guilty on one or more and ignores one or more, the law operates and supplies a verdict in favor of the accused

on the counts not mentioned. The law never, however, operates against an accused, and if a man be acquitted on one count and the others are ignored, the law will not supply a verdict of guilty on the counts not answered. The correct procedure in such a case would be to compel the jury to respond to all the counts or discharge it, and in fact that should be the procedure in all cases where counts are not responded to.

A Jury Must Pass Upon Each Count Separately.

In Commonwealth *vs.* Carey (103 Mass., 214), the Court laid it down as a cardinal principle of criminal law, that where several offenses of the same general character and subject are charged in separate counts of the same indictment,

"The jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offense therein charged. And if they fail to do so, *their verdict cannot be sustained.*"

It is quite clear that where a defendant is charged with several offenses, he is entitled to the answer of his peers upon each one of the charges. This is a guarantee which is implied by the right given him to be tried by a jury.

In Commonwealth *vs.* Fitchburg Railroad (120 Mass., 372), the judge, rendering the opinion of the Court, stated (page 381) that the jury should have been instructed to return a verdict of guilty upon the count proved, if either were proved, and not guilty upon all the others. It will be thus noticed that it is laid down as a fundamental principle, by the Massachusetts courts and consistently adhered to, that a jury must respond by a verdict of either guilty or not guilty to each count in an indictment, and where they could not do so, the verdict is defective and no judgment can be pro-

nounced upon it. This principle is expressly upheld by the courts of Ohio and Nebraska.

WHERE THE JURY DISAGREE ON ONE COUNT IT IS NO VERDICT.

In the case of George Hurley *vs.* State of Ohio (6 Ohio, page 403), the jury returned a verdict that they acquitted Hurley on the first count and disagreed on the other two. The judge refused to enter the verdict, continued the prosecution, and discharged the jury. At the next term Hurley was again placed on trial and his attorney filed a plea in bar which was overruled. On the second trial, Hurley was acquitted on the first two counts and convicted on the third count. On writ of error the Supreme Court held that the judge in the first trial did not err in refusing the verdict of the jury, as it was no verdict at all, but a nullity. In reaching this conclusion the Court, in the last paragraph of page 403, said:

"A verdict in either a civil or criminal case must be considered an entire thing. It must respond to the whole declaration, and to every count in the indictment, or the court cannot legally receive it as the verdict of the jury. * * * In this case the record shows that the jury could not agree on a verdict on the last two counts in the indictment; and having agreed on the first was no reason why the verdict should have been received. It was in law no verdict, and the court did not err in rejecting it altogether."

The above case is directly in point, and the attention of the Court is particularly called to the same.

See, also, Fox *vs.* State, 34 Ohio State, 377.
Hanley *vs.* Levin, 5 Ohio, 227.
Jackson *vs.* State, 39 Ohio State, 37.

In Hurley *vs.* State of Ohio, *supra*, the indictment against Hurley charged three different degrees of the same crime.

The counts charged respectively murder in the first degree, murder in the second degree, and manslaughter.

The jury acquitted Hurley of murder in the first degree, and disagreed as to whether he was guilty or not guilty of murder in the second degree, or guilty or not guilty of manslaughter.

The Supreme Court held this a bad verdict, because the jury did not respond to every count in the indictment. This was but upholding the doctrine that an accused is always entitled to a response to every charge made against him in an indictment, and unless a jury do this its verdict is void.

It will be noticed that the crime Hurley was charged with was killing, and the different counts were but charges of a different degree of that same killing.

In the case of Selvester, three counts each charged a different offense, and not the same offense on three occasions, and not different degrees of the same offense.

It is scarcely probable, that if the jury had acquitted Selvester on the first three counts and disagreed on the fourth, that the judge would have discharged him. He would not have had authority so to do, but would have been compelled, like the Ohio judge in Hurley's case, to have continued the prosecution and discharged the jury.

In Wilson *vs.* State of Ohio (20 Ohio, page 26), the Court said:

"But certain it is if the prosecutor be permitted to charge the prisoner with diverse crimes, subject to different shades of penalty, all in the same indictment, the plea of not guilty by the accused, puts in issue the truth of *all the charges*, and we are of opinion that the finding of the jury should be equally extensive."

See also Williams *vs.* State, 6 Neb., 343.
Casey *vs.* State, 20 Neb., 159.
Muller *vs.* Jewell, 66 Cal., 216.

A NOLLE PROSEQUI CANNOT BE ENTERED DURING TRIAL.

In the case under consideration, the District Attorney offered to enter a *nolle prosequi* as to the fourth count upon which the jury disagreed. This was objected to by the defendant, and the *nolle prosequi* was not entered.

It is a principle of criminal procedure, that a *nolle prosequi* cannot be entered during the trial. In Commonwealth *vs.* Scott, 121 Mass., page 33, the Court said:

"Before the jury is empannelled, or after conviction, a *nolle prosequi* may be entered without the assent of the defendant; but not during the trial. It is then the right of the defendant to have the jury pass upon his case, and he is entitled to a verdict which will be a bar to another indictment for the same offense, and a *nolle prosequi* is not a bar. At that stage of the proceedings his consent is necessary. (Commonwealth *vs.* Tuck, 20 Pick., 356, 365. Same *vs.* Kimball, 7 Gray. 328.")

The ruling in this case is cited with approval in Commonwealth *vs.* Adams, 127 Mass., page 15.

As stated by the Honorable Court above quoted, Selvester, in the case under consideration, was entitled to a verdict on the fourth count which would be a bar to another indictment for the same offense, but the response of the jury that it disagreed on the fourth count, is not a verdict which will bar Selvester from being again indicted or tried on that allegation.

THE VERDICT BEING INCOMPLETE WAS A NULLITY.

The indictment found against Selvester, though containing four counts, constituted but one indictment and could only be submitted to the jury as an entirety. A separate trial could not be had on each count, and therefore, to make a perfect trial on this indictment, the jury had to render a unanimous response to the indictment as a whole, or a com-

plete response to each portion of it. The answer of the jury that it found the accused guilty of three parts of the indictment, but disagreed as to whether he was guilty of the fourth part, was not an answer to the indictment, and not being a complete and unanimous answer to the indictment, was not a verdict at all.

Without a perfect verdict the judge was without jurisdiction to impose sentence. Until a perfect verdict is rendered to the Court by the jury, the former cannot impose a sentence. The law does not empower a judge to impose a penalty upon an accused until the jury has returned a full answer to the issue or issues submitted to it.

The ruling by the judge that the accused stood convicted, was not warranted by the answer of the jury. The Court could not supply the defective finding. (Bemus *vs.* Beekman, 3 Wend., 667.)

If an accused can be sentenced upon a finding where the jury declare they disagree as to part of the indictment, he could be sentenced where they disagreed on all the parts. If the judge can supply the defects in a part of the finding, he can supply it in all. A legal verdict is a complete answer to the indictment as a whole, and not to a portion of it.

It is true, as heretofore stated, that it has been held that where a jury finds an accused guilty on one or more counts, and does not mention the other counts, the verdict is good, but this is because the law always supplies the answer to the unanswered counts in favor of a defendant. This because the law presumes that when the jury made an express finding against the accused on certain counts and silence on the others, that it was their intention to acquit on the counts not mentioned.

But, as hereinbefore stated, such a presumption could not be invoked in favor of guilt. If a jury expressly acquitted

an accused on two counts and did not mention the other two, the law would not presume it intended to find him guilty on the two not mentioned. Every presumption in law is in favor of innocence.

A Disagreement is not a Response.

But in the case under consideration the jury left nothing to presumption. It expressly declared that it disagreed upon the fourth count. A disagreement is not a response, but a notice to the court that the jury can not respond because a unanimous answer can not be given. Such a declaration by the jury prevented the judge from acquiring jurisdiction to pronounce sentence. When once the issues have been submitted to a jury to determine, a judge's jurisdiction to impose judgment or discharge a prisoner is not acquired until the jury has rendered a complete answer to the indictment. If the jury fail to make answer, the judge can neither pronounce sentence nor discharge the prisoner, but only continue the prosecution and order his return to custody. The duty of a judge is to see that an accused is not "deprived of life, liberty, or property, without due process of law." It is also his duty, when a jury acquits an accused, to discharge him from custody, and when it convicts to pronounce the sentence of the law. But no judge can make an imperfect verdict perfect so he can pronounce judgment upon it, any more than he could indict a prisoner. He can not act as a jury any more than he could act as a grand jury. (Bemus *vs.* Beekman, 3 Wend., 667.)

The Accused Was Deprived of a Constitutional Right.

The Constitution of the United States guarantees that no person shall be deprived of life, liberty, or property without due process of law, and the case under consideration being

tried in a Federal court, that court is bound by that provision. In the case under consideration, the accused was entitled to a conviction or an acquittal upon every charge which the grand jury made against him. He was entitled to an answer from a jury of twelve men upon each one of the charges alleged in the indictment. Unless he received such an answer, after having been placed upon trial, he was deprived of a right which Justice Harlan, in the case of Hodges *vs.* Easton, heretofore cited, says is secured by the Constitution of the United States. Unless he receive a response from the jury to whom the charges against him are submitted, he is tried without due process of law. Every person who is charged in an indictment with an offense against the United States is entitled to a verdict which will forever set at rest the truth or falsity of the allegations made against him by the grand jury. No trial is a fair one which leaves undetermined a material allegation against the accused. It is manifestly unfair to an accused person to leave hanging over him an undetermined charge without his consent, and no verdict is complete which leaves a charge in that condition.

Conclusion.

From what has been said, it is respectfully submitted to this Honorable Court that the plaintiff in error, Selvester, is entitled to a new trial, as the proceeding had in the District Court was a nullity and the judge was without jurisdiction to render judgment upon the return of the jury to the issues submitted to it. The response of the jury was not a verdict upon which a judgment could be rendered by the Court, and the Court could not supply a defect in that response so as to make it a legal verdict.

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